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21 **IN THE SUPREME COURT**
22 **STATE OF ARIZONA**

23 In the Matter of,)	Supreme Court No. R-_____
)	
)	
24 PETITION TO AMEND ER 3.8 OF)	PETITION TO AMEND ER 3.8
25 THE ARIZONA RULES OF)	OF THE ARIZONA RULES
PROFESSIONAL CONDUCT (RULE)	OF PROFESSIONAL
42 OF THE ARIZONA RULES OF)	CONDUCT
SUPREME COURT))	
_____)	

26 *

Institutional designation is for identification purposes.

1 ¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Petitioners
2 respectfully request that this Court amend Ethical Rule (ER) 3.8 of the Arizona
3 Rules of Professional Conduct, which governs the ethical responsibilities of
4 prosecutors, as proposed in the attached Appendix A.

5 INTRODUCTION

6 ¶2 Following the adoption of the Model Rules of Professional Conduct nearly
7 thirty years ago, Arizona ER 3.8 has remained virtually identical to the
8 corresponding Model Rule 3.8. In 2008, the ABA adopted significant amendments
9 to Model Rule 3.8. These critical amendments, in short, give guidance to
10 prosecutors in discharging their ethical responsibilities when they learn of new and
11 probative evidence that an innocent person has likely been wrongfully convicted.
12 While caselaw recognizes a general ethical duty to disclose exculpatory evidence
13 acquired after a conviction, the contours of that duty are not clearly defined in
14 either caselaw or ethical rules. Arizona should maintain its history of consistency
15 and incorporate the ABA's recent amendments. This Petition explains why and
16 how through the following four parts: (I) the reason for the amendments; (II) a
17 survey of other states' adoption of the amendments; (III) a response to
18 prosecutorial concerns with the amendments; and (IV) a proposed rule, which is
19 substantially similar to the ABA's amendments, but which clarifies a few
20 ambiguities.

21 I. THE REASONS FOR A RULE

22 ¶3 We now know, for certain, that innocent people are sometimes sent to prison,
23 even death row. If we look only at DNA-testing cases, there have been 265
24 exonerations to date, and the vast majority of those wrongfully convicted are
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26

1 minorities.¹ With the famous cases of Ray Krone and Larry Youngblood, Arizona
2 is the home of perhaps the two highest-profile exonerations in the nation.
3 Unfortunately, these are not the only exonerations in Arizona. The Death Penalty
4 Information Center reports that as of October 27, 2010, there had been 138
5 exonerations of death row inmates. Eight of those inmates were from Arizona, with
6 Arizona ranking sixth highest among the states for the number of death row
7 exonerations.² Since these cases were exposed, the problem of wrongful
8 convictions has not been miraculously cured.³ Perhaps obviously, there is universal
9 agreement that such travesties of justice are just that—travesties—and any means to
10 mitigate such travesties should be taken seriously.

11 ¶4 In *Imbler v. Pachtman*, the Supreme Court noted that prosecutors are “bound
12 by the ethics of [their] office to inform the appropriate authority of after-acquired or
13 other information that casts doubt upon the correctness of the conviction.”⁴
14 Similarly, this Court has agreed, in passing dictum, that prosecutors have an
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16 ¹ See, e.g., Innocence Project, <http://www.innocenceproject.org/know/>.
17 These numbers grow each year. See *id.* (listing DNA exonerations by year).

18 ² See Innocence and the Death Penalty,
19 <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

20 ³ For example, Arizona had another DNA exoneration early this year.
21 See also generally D. Michael Risinger, *Innocents Convicted: An Empirically*
22 *Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761,
23 780 (2007) (estimating a 3–5% wrongful conviction rate for capital rape-murders).
24 It should go without saying, however, that prosecutors are often not the chief cause
25 of wrongful convictions in the first instance, but prosecutors always play a
26 consequential role—whether positive or negative—in post-conviction exonerations.

⁴ 424 U.S. 409, 427 n.25 (1976) (citing the ABA Standards for Criminal
Justice and former Code of Professional Responsibility).

1 “ethical and constitutional obligation to disclose clearly exculpatory material that
2 comes to [their] attention after the sentencing has occurred”⁵ Furthermore, as
3 the ABA noted when promulgating the amendments, “when a prosecutor concludes
4 upon investigation of such evidence that an innocent person was convicted, it is
5 well recognized that the prosecutor has an obligation to endeavor to rectify the
6 injustice.”⁶ Thus, prosecutors seem to have post-conviction obligations (i) to
7 disclose “clearly” exculpatory evidence and (ii) if that evidence shows that a person
8 has been wrongfully convicted, to do something about it. Neither obligation,
9 however, has been helpfully defined for prosecutors. Adopting Model Rule 3.8(g)
10 and (h) would remedy that void in Arizona. Indeed, Arizona would not be the first
11 state to accept this much-needed guidance, as discussed immediately below.

12 **II. OTHER STATES’ REACTIONS TO THE AMENDMENTS TO MODEL RULE 3.8**

13 ¶5 As of this writing, at least five states have adopted the ABA’s 2008
14 amendments in full or in substantial part. Those states are Colorado, Delaware,
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18 ⁵ *Canion v. Cole*, 115 P.3d 1261, 1262 (Ariz. 2005). The entire
19 discussion consists of the following sentence: “The Court of Appeals found, and the
20 State acknowledges, an ethical and constitutional obligation to disclose clearly
21 exculpatory material that comes to its attention after the sentencing has occurred,
22 *see Brady*, 373 U.S. at 87, 83 S.Ct. 1194 (setting forth requirement to disclose
23 clearly exculpatory material), and we affirm that the State does bear such a duty.”
Canion, 115 P.3d at 1262. The Court then went on to distinguish the issue. *See id.*
at 1262–63.

24 ⁶ AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION ET AL.,
25 REPORT TO HOUSE OF DELEGATES (Feb. 2008),
26 http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredfiveb_105B_FINAL.doc.

1 Idaho, Tennessee, and Wisconsin.⁷ Moreover, California's State Bar Board of
2 Governors has incorporated the amendments verbatim in the new California Rules
3 of Professional Conduct and submitted the proposed rules to the Supreme Court of
4 California for approval, the New York State Bar Association previously amended
5 the comments to its rules to include language substantially similar to the Model
6 Rule amendments, and the North Dakota Joint Committee on Attorney Standards
7 has just proposed amendments almost identical to Model Rule 3.8. Finally, at least
8 eight additional states are studying the amendments and assessing whether to
9 recommend their adoption.

10 ¶6 In sum, a significant number of other states are studying these amendments,
11 concluding that they constitute much-needed guidance, and adopting them
12 accordingly.

13 III. PROSECUTORS' CONCERNS

14 ¶7 The concern that our justice system is compromised by the conviction and
15 imprisonment of innocent persons is shared by all, including prosecutors. Indeed,
16 in Wisconsin—which became the first state to adopt the Rule 3.8 amendments—the
17 petition to amend the state's ethics rules was filed by the Wisconsin District
18 Attorney's Association.⁸ Similarly, and importantly, the National District
19 Attorneys Association, the largest and oldest organization representing criminal

21 ⁷ See AMERICAN BAR ASSOCIATION, CPR POLICY IMPLEMENTATION
22 COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT
23 RULE 3.8(G) AND (H) (Jan. 10, 2011),
http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/3_8_g_h.authcheckdam.pdf.

25 ⁸ See, e.g., <http://www.legalethicsforum.com/files/rule-3.8-as-adopted-by-wisconsin-effective-july-1-2009.pdf> (providing a copy of the July 17, 2009 order
26 of the Supreme Court of Wisconsin adopting amendments).

1 prosecutors in the world, recently adopted a similar standard outlining prosecutorial
2 notification, disclosure, and remedial responsibilities in post-conviction innocence
3 cases.⁹

4 ¶8 Nevertheless, not all agree on the best way to address the problem; indeed,
5 some propose doing nothing as a solution. The Prosecution Section of the Criminal
6 Practice and Procedure Committee of the State Bar of Arizona voiced concerns
7 about the changes recommended by the ABA.¹⁰ The Committee on the Rules of
8 Professional Conduct also declined to draft a rule change petition. Prosecutors

9 ⁹ The full text of the rule follows:

10
11 When the prosecutor is satisfied that a convicted person is actually
12 innocent, the prosecutor should notify the appropriate court and unless
13 the court authorizes a delay, the defense attorney, or the defendant, if
14 the defendant is not represented by counsel, and seek the release of the
15 defendant if incarcerated. If the prosecutor becomes aware of material
16 and credible evidence which leads him or her to reasonably believe a
17 defendant may be innocent of a crime for which the defendant has
18 been convicted, the prosecutor should disclose, within a reasonable
period of time, as circumstances dictate, such evidence to the
appropriate court and unless the court authorizes a delay, to the
defense attorney, or to the defendant, if the defendant is not
represented by counsel.

19 NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION
20 STANDARDS 8-1.8 (3d ed. 2009) (“Duty of Prosecutor in Cases of Actual
21 Innocence”); *cf. also id.* Standard 8-1.6 (“The prosecutor shall not assert or contest
22 an issue on collateral review unless there is a basis in law and fact for doing so. The
23 basis should not be frivolous. . . .”); ABA STANDARDS FOR CRIMINAL JUSTICE:
24 Prosecution Function Standard 3-3.11(c) (3d ed. 1999) (“A prosecutor should not
intentionally avoid pursuit of evidence because he or she believes it will damage the
prosecution’s case or aid the accused.”).

25 ¹⁰ See Criminal Practice & Procedure Committee Prosecution Section,
26 State Bar of Arizona, Report to the State Bar Ethics Committee (Feb. 25, 2010)
(listing possible concerns with the ABA’s Model Rule amendments).

1 have expressed the following five initial concerns with the amendments. Each
2 concern is explained and addressed below.

3 *Concern 1:* What does “new, credible and material evidence” mean? And
4 why should prosecutors have to disclose such evidence on such a seemingly
5 low standard?

6 *Answer:* The amendments’ standard for action is actually very high. The
7 standard not only requires “knowledge”¹¹ of “new, credible and material
8 evidence,” but also requires that such evidence create a reasonable
9 “likelihood” that the person was actually innocent of the offense.¹² But to
10 alleviate any remaining concerns, in our proposed rule in Part IV below, we
11 have inserted additional commentary (borrowed from the fine state of
12 Colorado) further clarifying both (1) what is “new” evidence and (2) some of
the factors that a prosecutor might consider in determining whether that new
evidence is “credible and material.” We have also inserted language that
more carefully identifies the prosecutor on whom the obligations are
imposed.

13 *Concern 2:* Why should the disclosure portion of the rule in subsection (g)
14 apply only to prosecutors and not every attorney who comes in contact with
15 such exculpatory evidence?

18 ¹¹ ER 1.0(f) of the Arizona Rules of Professional Conduct and Model
19 Rule 1.0(f) both define “knows” as “actual knowledge of the fact in question.” As
20 noted in the ABA recommendation, “indirect or imputed knowledge will not
21 suffice.” *See supra* note 6. Moreover, ER 3.8 has long used “knows” as the
applicable standard (along with many other ethics rules).

22 ¹² *See generally* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial*
23 *Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467,
24 471–72 (2009) (noting that this high standard for action sets only a “bare
25 minimum” and suggesting that prosecutors should go above and beyond it). We
26 thank Bruce Green, who was one of the chief architects of these amendments in
both the ABA and New York, for his input, from which we have borrowed liberally
in this Petition.

1 *Answer:* First and foremost, the prosecutor is a “minister of justice,” whose
2 duty is not merely to convict people.¹³ Second, the prosecutor often has
3 access to information that is not available to the public. Third, in some cases,
4 at least inadvertently, the prosecutor may have been partially responsible for
5 the wrongful conviction in the first place. Fourth, and finally, unlike defense
6 counsel, the prosecutor does not have countervailing confidentiality duties in
7 this context.

8 *Concern 3:* Will the duty to “investigate” subject prosecutors to civil
9 liability?

10 *Answer:* First, the proposed rule requires no actual investigation, only
11 reasonable efforts to cause an investigation. Second, there is no precedent
12 that this, or any other, ethics rule will subject prosecutors to civil liability. In
13 fact, the Supreme Court partially justifies the grant of broad civil immunity
14 to prosecutors on the very basis that prosecutors were subject to professional
15 disciplinary rules. Thus, because “a prosecutor stands . . . amen[able] to
16 professional discipline by an association of his peers,” this fact
17 “undermine[s] the argument that the imposition of civil liability is the only
18 way to insure that prosecutors are mindful of the constitutional rights of
19 persons accused of crime.”¹⁴ Finally, the ABA recommendation includes

20 ¹³ *See, e.g.,* ARIZ. RULES OF PROF’L CONDUCT ER 3.8 cmt. 1 (“A
21 prosecutor has the responsibility of a minister of justice and not simply that of an
22 advocate. This responsibility carries with it specific obligations to see that the
23 defendant is accorded procedural justice and that guilt is decided upon the basis of
24 sufficient evidence.”); *In re Peasley*, 90 P.3d 764, 772–73 (Ariz. 2004) (“The
25 prosecutor’s interest in a criminal prosecution ‘is not that it shall win a case, but
26 that justice shall be done.’ In addition, courts generally recognize that the ethical
27 rules impose high ethical standards on prosecutors.”) (internal citations omitted).

28 ¹⁴ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Connick v. Thompson*,
29 131 S. Ct. 1350, 1362–63 (2011) (suggesting that, because prosecutors are subject
30 to professional discipline, there is little reason to impose civil liability for failing to
31 train subordinate prosecutors on their disclosure obligations); *see also* ARIZ. RULES
32 OF PROF’L CONDUCT Scope (“Violation of a Rule should not itself give rise to a
33 cause of action against a lawyer nor should it create any presumption in such a case
34 that a legal duty has been breached. . . . The Rules are designed to provide
35 guidance to lawyers and to provide a structure for regulating conduct through
36 disciplinary agencies. They are not designed to be a basis for civil liability.”). It is

1 new comment [9], which provides that a prosecutor's erroneous but good
2 faith judgment that new evidence does not trigger these new obligations does
3 not constitute a violation of the rule.

4 *Concern 4:* Are there any prosecutors who have refused to take action (or
5 have frustrated others' action) when presented with strong evidence of
6 innocence?

7 *Answer:* The amendments are primarily designed to offer much-needed
8 guidance, and ideally, no prosecutor will ever violate the new rules. But the
9 answer is yes: some (but by no means all) prosecutors have sat on their
10 hands—or outright resisted—in the face of rock-solid evidence that they had
11 inadvertently convicted the innocent.¹⁵

12 *Concern 5:* The proposed obligations seem inconsistent with existing law,
13 which would be confusing.

14 *Answer:* In fact, there is little existing law—and certainly none that
15 affirmatively conflicts with the proposed rule. The current state of the law
16 offers almost no rule-based guidance, and the case law—which mentions in
17 passing only the “ethics of office” and “clearly” exculpatory evidence—is of
18 little practical assistance to prosecutors in determining their precise ethical
19 duties in these situations. These amendments would finally provide some
20 clear guidance, which thus would be the opposite of “confusing” to
21 prosecutors.¹⁶

22 also noteworthy that the National District Attorneys Association has promulgated a
23 similar ethics rule (as noted above in both the text and note 9). Because that
24 organization's official policy is that prosecutors should be afforded full protection
25 from civil liability, it is highly unlikely that it would have promulgated such a rule
26 if, in doing so, it would open up the litigation floodgates.

21 ¹⁵ See, e.g., Aviva Orenstein, *Facing the Unfaceable: Dealing with*
22 *Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO
23 L. REV. 401 (2011), available at <http://ssrn.com/abstract=1682076>; Daniel S.
24 Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of*
25 *Innocence*, 84 B.U. L. REV. 125 (2004).

26 ¹⁶ It also bears noting that ethics rules in general, and ER 3.8 in
particular, impose additional requirements on lawyers. See, e.g., ABA Standing
Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) (noting that

¶9 In sum, the concerns do not justify a do-nothing approach. At best, they suggest that the language of the ABA’s amendments should be refined to eliminate any unintended ambiguities, which we have done in the accompanying Proposal below.

IV. PROPOSED AMENDMENTS

¶10 Using the amendments to the Model Rule as the foundation, the following proposed language clarifies the amendments in light of the concerns expressed above. All modifications to the Model Rule are noted through redlines; and as further noted, most of these modifications were adapted from sister states that have already adopted the amendments.¹⁷

3.8. Special Responsibilities of a Prosecutor

* * *

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

Model Rule 3.8(d) imposes more stringent disclosure obligations than those of the Constitution); *see generally In re Peasley*, 90 P.3d 764, 772–73 (Ariz. 2004) (“[C]ourts generally recognize that the ethical rules impose high ethical standards on prosecutors.”).

¹⁷ Appendix A shows how the proposal would amend the current language of ER 3.8.

1 (2) if the judgment of conviction was entered by a court in which the
2 prosecutor exercises prosecutorial authority~~if the conviction was obtained~~
3 ~~in the prosecutor's jurisdiction,~~¹⁸

4 (i) promptly disclose that evidence to the defendant unless a court
5 authorizes delay, and

6 (ii) undertake further investigation, or make reasonable efforts to cause
7 an investigation, to determine whether the defendant was convicted of
8 an offense that the defendant did not commit.

9 (h) When a prosecutor knows of clear and convincing evidence establishing that a
10 defendant in the prosecutor's jurisdiction was convicted of an offense that the
11 defendant did not commit, the prosecutor shall seek to remedy the conviction.

12 **Comment**

13 [1] A prosecutor has the responsibility of a minister of justice and not simply
14 that of an advocate. This responsibility carries with it specific obligations to see that
15 the defendant is accorded procedural justice, that guilt is decided upon the basis of
16 sufficient evidence, and that special precautions are taken to prevent and to rectify
17 the conviction of innocent persons. The extent of mandated remedial action is a
18 matter of debate and varies in different jurisdictions. Many jurisdictions have
19 adopted the ABA Standards of Criminal Justice Relating to the Prosecution
20 Function, which are the product of prolonged and careful deliberation by lawyers
21 experienced in both criminal prosecution and defense. Competent representation of
22 the sovereignty may require a prosecutor to undertake some procedural and
23 remedial measures as a matter of obligation. Applicable law may require other
24 measures by the prosecutor and knowing disregard of those obligations or a
25 systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

26 * * *

[7] Evidence is considered new when it was unknown to a trial prosecutor at the
time the conviction was entered or, if known to a trial prosecutor, was not disclosed

¹⁸ These changes were inspired by the new Colorado and Tennessee
rules. *See* COLO. RULES OF PROF'L CONDUCT R. 3.8(g)(2) (2010); TENN. RULES OF
PROF'L CONDUCT R. 3.8(g)(1) (2011).

1 to the defense, either deliberately or inadvertently. The reasons for the evidence
2 being unknown (and therefore new) are varied. It may be new because: the
3 information was not available to a trial prosecutor or the prosecution team at the
4 time of trial; the significance of the evidence was not appreciated by the trial
5 prosecutor or prosecution team at the time of trial; the police department
6 investigating the case or other agency involved in the prosecution did not provide
7 the evidence to a trial prosecutor; or recent testing was performed that was not
8 available at the time of trial.¹⁹ When a prosecutor knows of new, credible and
9 material evidence creating a reasonable likelihood that a person outside the
10 prosecutor's jurisdiction was convicted of a crime that the person did not commit,
11 paragraph (g) requires prompt disclosure to the court or other appropriate authority,
12 such as the chief prosecutor of the jurisdiction in which where the conviction
13 occurred. If the conviction was obtained in a court in which the prosecutor
14 exercises prosecutorial authoritythe prosecutor's jurisdiction, paragraph (g) requires
15 the prosecutor to examine the evidence and undertake further investigation to
16 determine whether the defendant is in fact innocent or make reasonable efforts to
17 cause another appropriate authority to undertake the necessary investigation, and to
18 promptly disclose the evidence to the court and, absent court-authorized delay, to
19 the defendant. Thus, if the prosecutor makes a reasonable effort to cause an
20 investigation, it is not necessary for the prosecutor personally to conduct an
21 investigation. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a
22 represented defendant must be made through the defendant's counsel, and, in the
23 case of an unrepresented defendant, would ordinarily be accompanied by a request
24 to a court for the appointment of counsel to assist the defendant in taking such legal
25 measures as may be appropriate.

18 [8] Under paragraph (h), once the prosecutor knows of clear and convincing
19 evidence that the defendant was convicted either of an offense that the defendant
20 did not commit or of an offense that involves conduct of others for which the
21 defendant was legally accountable but which those others did not commit,²⁰ the
22 prosecutor must seek to remedy the conviction. Necessary steps may include
23 disclosure of the evidence to the defendant, requesting that the court appoint
24 counsel for an unrepresented indigent defendant and, where appropriate, notifying

25 ¹⁹ See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 8A (2010).

26 ²⁰ See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 8 (2010).

1 the court that the prosecutor has knowledge that the defendant did not commit the
2 offense of which the defendant was convicted.

3 [9] A prosecutor's reasonable~~independent~~²¹ judgment, made in good faith, that
4 the new evidence is not of such nature as to trigger the obligations of sections (g)
5 and (h), though subsequently determined to have been erroneous, does not
6 constitute a violation of this Rule. Factors probative of the prosecutor's reasonable
7 judgment that the evidence casts serious doubt on the reliability of the judgment of
8 conviction include, but are not limited to, the following factors: whether the
9 evidence was essential to a principal issue in the trial that produced the conviction;
10 whether the evidence goes beyond the credibility of a witness; whether the evidence
11 is subject to serious dispute; or whether the defendant waived the establishment of a
12 factual basis pursuant to criminal procedural rules.²²

13 CONCLUSION

14 ¶11 In light of the foregoing discussion, the ABA's recent amendments to Model
15 Rule 3.8 should be incorporated into ER 3.8, along with the modifications (or rough
16 equivalents) suggested above, without further delay. Wrongful convictions happen,
17 and Arizona's ethics rules currently provide next-to-no guidance to prosecutors in
18 the face of such travesties of justice. This current inattention is puzzling and has
19 placed Arizona behind the ethics curve on this issue. To remedy this fact, these
20 amendments pay overdue attention to the second half of the prosecutor's "twofold
21 aim"—"that guilt shall not escape *or innocence suffer*."²³

22 ²¹ See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 9 (2010).

23 ²² See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 9A (2010).

24 ²³ *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). As
25 our Supreme Court has noted, the "prosecutor's interest in a criminal prosecution is
26 not that it shall win a case, but that justice shall be done." *In re Peasley*, 90 P.3d
764, 772–73 (Ariz. 2004) (internal quotation omitted). Owing in part to this duty,
the National District Attorneys Association has already adopted a standard
analogous to the proposed amendments. *See supra* note 9.

1 **RESPECTFULLY SUBMITTED** this 1st day of November, 2013.

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18 of the Supreme Court of Arizona
19 this 1st day of November, 2011.

20 By: Keith Swisher

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26 * Institutional designation is for identification purposes.

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APPENDIX A

ER 3.8. Special Responsibilities of a Prosecutor

(a) – (f) [No changes to text]

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, ~~and~~ that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of ER 8.4.

* * *

[7] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the significance of the evidence was not appreciated by the trial prosecutor or prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed that was not available at the time of trial. When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction in which the conviction occurred. If the conviction was obtained in a court in which the prosecutor exercises prosecutorial authority, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Thus, if the prosecutor makes a reasonable effort to cause an investigation, it is not necessary for the prosecutor personally to conduct an investigation. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted either of an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant was legally accountable but which those others did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

1 [9] A prosecutor's reasonable judgment, made in good faith, that the new
2 evidence is not of such nature as to trigger the obligations of sections (g) and
3 (h), though subsequently determined to have been erroneous, does not
4 constitute a violation of this Rule. Factors probative of the prosecutor's
5 reasonable judgment that the evidence casts serious doubt on the reliability of
6 the judgment of conviction include, but are not limited to, the following factors:
7 whether the evidence was essential to a principal issue in the trial that produced
8 the conviction; whether the evidence goes beyond the credibility of a witness;
9 whether the evidence is subject to serious dispute; or whether the defendant
10 waived the establishment of a factual basis pursuant to criminal procedural
11 rules.
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